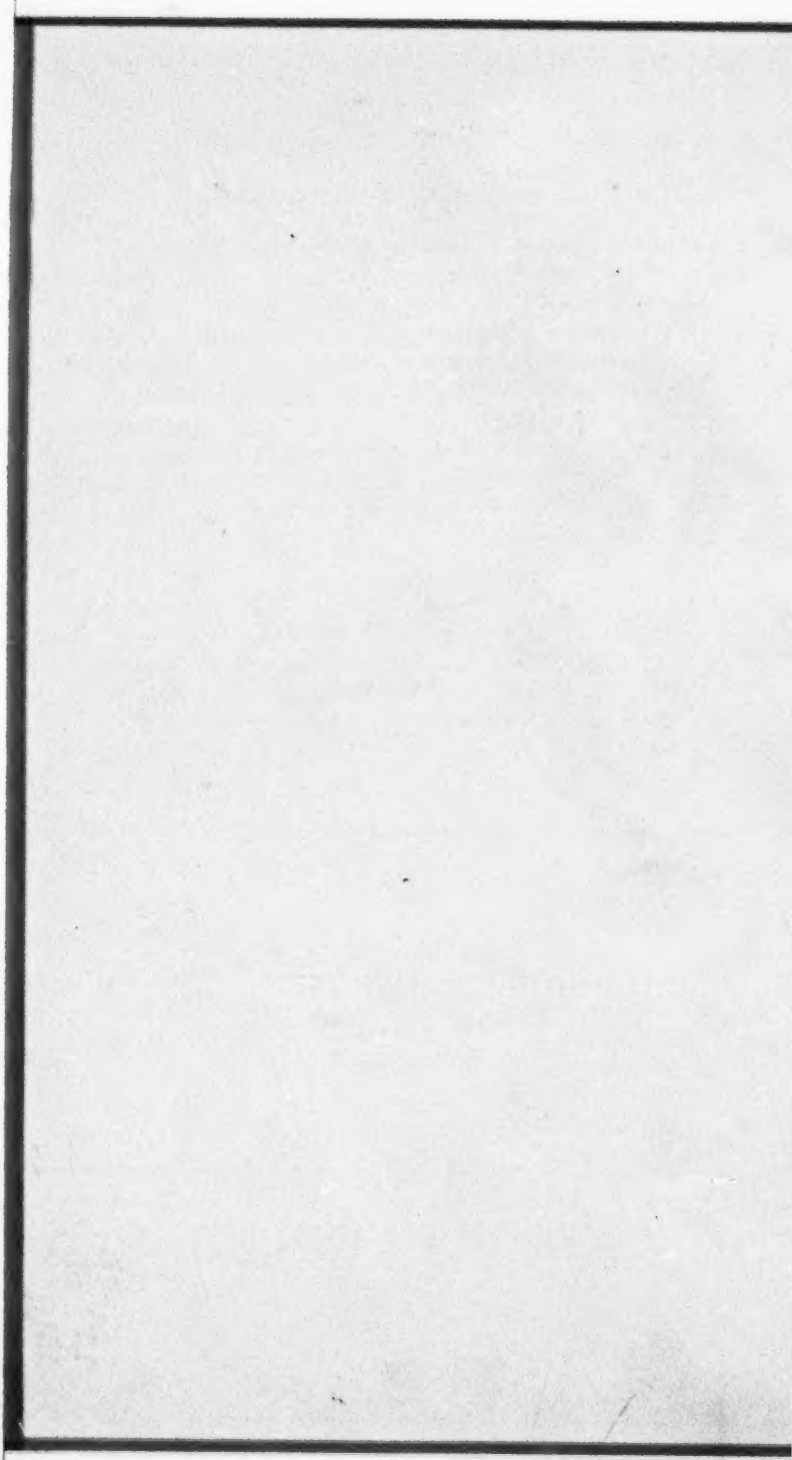

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

A. HALL JOHNSTON,
Counsel for the Petitioner.

JOHN Y. JORDAN, JR.,
Of Counsel.

(36,874)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, C. V. Sorrells, by A. Hall Johnston, his counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on April 15th, 1932, affirming the decision of the United States District Court for the Western District of North Carolina (at Asheville).

Question Presented.

May similar acts or conduct of an accused committed subsequently to the act charged in the bill of indictment be introduced in evidence against him?

Does entrapment, when relied upon by an accused and properly shown by the evidence constitute a valid defense to a criminal prosecution?

Where the evidence presents a question of fact for the jury upon the issue of entrapment, should such issue be submitted to the jury under proper instructions?

Statutes Involved.

National Prohibition Act, as amended January 15, 1931, Chapter 29, 46 Stat. 1036; 27 U. S. C. A., Sec. 91:

> "Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the

production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both."

Statement.

The facts are succinctly stated in the dissenting opinion of the Circuit Court of Appeals (R. 16-17) as follows:

> "The defendant, Sorrells was regularly employed by the Champion Fibre Company at Canton, North Carolina, and had not missed a pay day since March, 1924. On Sunday, July 13, 1930, a prohibition agent visited Sorrells' home in the country near the village of Clyde, North Carolina, in order to try to buy intoxicating liquors from him, and if successful, to prosecute him for violation of the National Prohibition law. The agent was accompanied by three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good whiskey. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a

half, and during this interval it transpired that Sorrels and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed, and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of five dollars. There was evidence tending to show that Sorrells bore a good reputation in the community. To offset this testimony, the Government called a number of witnesses in rebuttal who said that for a considerable period prior to the sale, Sorrells had the general reputation of being a rum-runner, and that this reputation was known to the agent. The Government also proved that Sorrells made a subsequent sale of intoxicating liquor on August 28, 1930, when solicited by the prohibition agent, and also that a search of the defendant's premises two weeks later revealed eleven one-half gallon jars of whisky hidden in a thicket seventy-five yards from the defendant's house and a ten gallon keg containing three and a half gallons of wine secreted near his residence."

Upon the trial of the action upon the resting of its case by the Government, the defendant moved the Court for a directed verdict of not guilty. The motion was overruled and the defendant then and there duly objected and excepted. Upon the conclusion of all the

evidence the defendant renewed his motion for a directed verdict of not guilty, which said motion was overruled and the defendant then and there duly objected and excepted. The defendant in apt time tendered the Court written request for instructions which request was denied and the defendant then and there duly objected and excepted. The trial court charged the jury that as a matter of law no issue of entrapment had been presented and the jury should return a verdict of guilty. Upon the returning of the verdict by the jury, the defendant was sentenced to eighteen months in the United States Penitentiary at Atlanta, Georgia, following which the defendant duly appealed to the Circuit Court of Appeals.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in affirming the decision of the District Court in that;

1. The Court erred in its failure to find that from the evidence adduced at the trial, a clear case of entrapment was shown, thereby entitling the defendant to a directed verdict of not guilty; and

2. The Court erred in its failure to find that the issue of entrapment should have been presented to the jury under proper instructions; and

3. The Court erred in its failure to find that the evidence of similar acts committed subsequent to the offense charged in the bill of indictment were inadmissible and prejudicial to the rights of the defendant.

Reasons for Granting the Writ.

1. The question involved is one of great public importance and vitally affects the Government in its administration of the National Prohibition Act. United States attorneys and district judges in the various districts are not agreed upon an interpretation of the law herein involved and consequently the procedure and decisions in the various districts is neither uniform nor consistent.

2. The opinion of the Circuit Court of Appeals in this case announces a rule of law contrary to that stated in its former decision in *Newman* v. *United States,* 299 Fed. 128, and the opinion of the Circuit Court in this case is in conflict and at variance with the holdings of the Circuit Court of Appeals in the Ninth Circuit (*Peterson* v. *United States,* 255 Fed. 433); the Eighth Circuit (*Butts* v. *United States,* 273 Fed. 35); and the Seventh Circuit (*O'Brian* v. *United States,* 51 Fed. (2) 674.

3. A final determination by this Court will clarify the law since the various circuit courts have reached diverse conclusions on these issues.

4. The case presents clearly for the consideration of this Court an issue which does not come within the circumstances and principles of law as set forth in the opinion of this Court in the recent case of *Casey* v. *United States,* 276 U. S. 413.

5. Many cases in which these questions are at issue are pending in the Federal courts.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

C. V. SORRELLS,
By A. HALL JOHNSTON,
Counsel for the Petitioner.

JOHN Y. JORDAN, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No written opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 57 Fed. (2d) 973 (R. 31).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered April 15, 1932 (R. 49). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (as amended), 28 U. S. C. A., Sec. 347.

Statement.

A statement of facts and of the errors relied on will be found in the Petition.

ARGUMENT.

First Proposition.

The admissibility of the testimony of the Government's witnesses, White and Martin as to the *subsequent* transactions with the defendant.

In making out its case the Government was allowed to show against the defendant's objection that an alleged sale was made by the defendant approximately a month after the alleged commission of the offense for which the defendant was on trial.

It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text writers and in numberless decisions. An exception is found in cases where the criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of *prior* misconduct of like character for the purpose of proving the intent with which the particular act was committed."

Day v. *United States*, 220 Fed. 818 (at 819) (4th Cir.); *Carpenter* v. *United States*, 280 Fed. 598 (at 600) (4th Cir.); *Newman* v. *United States*, 289 Fed. 712 (at 716) (4th Cir.); *Lynch et al.*, v. *United States*, 12 Fed. (2) 193 (at 194) (4th Cir.).

Second Proposition.

The Court should have directed a verdict in favor of the defendant upon the resting by the Government of its case.

It is seriously and earnestly contended that the evidence introduced by the Government against the defendant clearly showed entrapment. The Prohibition Agent, Martin, who purchased the whiskey, admitted on cross examination that he was the first and only person to mention the question of securing liquor and that he asked and begged the defendant two or three times to procure the liquor. The witness testified that

the defendant stated he did not have any whiskey and that he did not fool with it and that it was only after considerable conversation and repeated urging on the part of the Agent that the defendant was persuaded to go off and procure whiskey. The Agent further testified on cross examination that he went to the home of the defendant with the express purpose of endeavoring to have the defendant procure and sell him, the Agent, liquor and that if he, the Agent was successful in inducing the defendant to procure whiskey to then indict and prosecute the defendant for the commission of the offense.

The particular attention of the Court is respectfully directed to the fact that the record fails to contain a scintilla of evidence tending to show that the defendant prior to the time of the visit to his home by the Prohibition Agent was suspected of handling or selling liquor and there is not a scintilla of evidence in the record tending to show that the defendant, prior to the time of the offense alleged in the bill of indictment, had ever in any manner handled or sold liquor. The record also fails to disclose a scintilla of evidence to the effect that the Prohibition Agent suspected the defendant or had any reports concerning the defendant prior to the commission of the offense alleged in the bill of indictment.

> "Where officers of the law have incited a person to commit the crime charged and lured him on to its consummation with the purpose of arresting him in its commission the law will not authorize a verdict of guilty."
>
> "When the criminal design originates, *not with the accused*, but is conceived in the mind of

> the Government Officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor. The first duty of the officers of the law is to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.); Annotations and Note in 18 A. L. R. 143 at 149 and 164. *O'Brien* v. *United States,* 51 Fed. (2) 674.

Third Proposition.

That the Court should, at the conclusion of all the testimony, have directed a verdict of not guilty.

The testimony offered by the defendant showed conclusively that he was persuaded and induced by the Prohibition Agent to procure the liquor and that the defendant did so only after repeated requests and solicitations by the Agent. The defendant's testimony further showed that the Agent was the first and only person who brought up the subject of whiskey and that nothing was said about whiskey, nor were there any indications that the defendant had any desire, opportunity or facilities for the procuring of any whiskey.

The testimony offered by the defendant showed that he was a regular employee of the Champion Fiber Company of Canton, North Carolina, and that he had

been regularly employed by such Company from March, 1924, continuously to the time of his trial, and the record discloses the fact that the defendant had not missed a single pay roll during such period of time.

Again the particular attention of the Court is respectfully directed to the fact that the entire testimony in the record, including the rebuttal testimony of the Government, fails to show a scintilla of evidence to the effect that *prior* to the commission of the alleged offense the defendant had any reputation as a liquor dealer or that he was suspected of handling liquor, *or that prior* to the alleged offense the Prohibition Agent suspected the defendant or had any report as to the defendant handling liquor.

The defendant respectfully insists that at the conclusion of all the evidence a clear case of entrapment was made out and that a verdict should have been directed in his favor.

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.).

Fourth Proposition.

That the Court should have given as a part of its charge to the jury the written request for instructions, which defendant, in apt time, tendered, and which appear in the record herein.

The defendant respectfully insists that the question of entrapment is a question of fact to be determined

by the jury and not a question of law to be decided by the Court and that wherever entrapment is offered as a defense the question should, under proper instructions, be submitted to the jury.

> "In a criminal prosecution where the defense was that the defendant was incited and induced to commit the offense by officers for the purpose of entrapment the refusal of instructions submitting that question to the jury as one of fact and the giving of instructions treating it as one of law and charging that it presented no defense was error."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 38) (8th Cir.).

> "When in a criminal prosecution the question of entrapment arises the defendant is entitled to an accurate statement of the law of entrapment. The jury should be instructed as to what in law constitutes entrapment and it is then a question of fact to be determined by the jury under such instructions as to whether or not there was an entrapment."

Newman v. *United States,* 299 Fed. 126 (at 131) (4th Cir.).

> "Where the evidence presents a question of fact for the jury upon the issue of entrapment such issue should be submitted to the jury under proper instructions."

Silk v. *United States,* 16 Fed. (2) 568 (at 570) (8th Cir.).

> "Where the evidence on the question of entrapment is in conflict it presents an issue of

> fact for the jury on proper instructions and it is not within the province of the Court to decide it. If it be made out by the proof to the satisfaction of the jury it constitutes a complete defense to the charge."

Jarl v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

Fifth Proposition.

The Court erred in its charge to the jury when it charged them as follows:

> "Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

Peterson v. *United States*, 255 Fed. 433 (9th Cir.); *Butts* v. *United States*, 273 Fed. 35 (at 38) (8th Cir.); *Newman* v. *United States*, 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States*, 16 Fed. (2) (at 570) (8th Cir.); *Jarl* v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THE ISSUE PRESENTED MAY BE FINALLY DETERMINED.

The petition herein points out that the Circuit Court decision in this case is at variance with the holding of

the same Court in the previous case of *Newman* v. *United States*, 299 Fed. 128, and the petition further points out that the Circuit Court decision in this case is at variance with the holdings of the Circuit Courts of Appeals for the Seventh, Eighth and Ninth Circuits.

Not only is it true that the decision rendered by the Circuit Court in this case is at variance with Circuit Courts of other Circuits, but the majority opinion of the Circuit Court in this case is at variance with and contrary to the decisions of the Supreme Court of the United States in the various cases decided by such Court as pointed out by Circuit Judge Soper in his dissenting opinion in this case.

CONCLUSION.

It is respectfully submitted that the issues in this case raised by the record herein will clearly present to the Court the fact that the majority opinion of the Circuit Court of Appeals for the Fourth Circuit was erroneous and contrary to the overwhelming majority of judicial opinions as rendered by the various Circuit Courts of Appeals of the United States and this Court.

JOHN Y. JORDAN, JR.,
Of Counsel.

A. HALL JOHNSTON,
Counsel for the Petitioner.